

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EVANSTON INSURANCE
COMPANY

Plaintiff/Counter-Defendant

v.

GENE BY GENE, LTD.

Defendant/Counter-Plaintiff.

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Civil Action No.: 4:14-cv-1842

**DEFENDANT GENE BY GENE LTD.'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Defendant Gene by Gene, Ltd. (“Gene by Gene”) hereby moves the Court to grant summary judgment in its favor on all claims asserted by Plaintiff Evanston Insurance Company (“Evanston”) and counterclaims asserted by Gene by Gene. The bases for the Motion are set forth in the accompanying Memorandum in Support, and exhibits thereto.

Gene by Gene’s insurer, Evanston, has wrongfully denied Gene by Gene coverage for claims asserted against Gene by Gene in an underlying lawsuit pending in Alaska. Gene by Gene is entitled to the coverage pursuant to four insurance policies issued by Evanston to Gene by Gene. But Evanston has refused

to defend Gene by Gene based upon a “catch-all” provision contained in an exclusion in the policies. Both Parties have filed claims seeking declaratory judgment from this Court on the coverage issues.

As outlined in the accompanying Memorandum In Support, Evanston’s interpretation of the exclusion’s catch-all provision is overly broad and is inconsistent with well-established judicial canons of contract construction. Moreover, Evanston’s interpretation renders the remainder of the exclusion meaningless surplusage in contravention of Texas law. Conversely, Gene by Gene’s construction of the exclusion is the only reasonable one, and is supported by Texas law governing policy interpretation, and the Texas Department of Insurance’s approval of the policy language at issue here. The allegations in the underlying lawsuit plainly fall within the “personal injury and advertising injury liability” provisions of the policies, and the exclusion does not apply.

Therefore, Gene by Gene is entitled to summary judgment on the Parties’ requests for declaratory judgment and on Gene by Gene’s additional claims for breach of contract and violation of Chapter 542 of the Texas Insurance Code. Gene by Gene respectfully requests that the Court grant Gene by Gene summary judgment as follows:

- (a) issue a declaration that the claim in the Underlying Lawsuit is covered and that Evanston is required to defend Gene by Gene in the Underlying Lawsuit,
- (b) issue a declaration that Evanston is obligated to indemnify Gene by Gene for any amounts Gene by Gene is obligated to pay as a result of the Underlying Lawsuit;
- (c) grant summary judgment in Gene by Gene's favor on its claims for breach of contract and violation of Chapter 542 of the Texas Insurance Code,¹ and award to Gene by Gene attorney's fees, costs, and such other relief as the Court finds appropriate.

WHEREFORE, Defendant respectfully requests that this Court grant summary judgment in its favor and against Plaintiff on all claims.

¹ Gene by Gene has incurred significant attorney's fees and damages as a result of Evanston's breach of contract and Chapter 542 violation. Accordingly, Evanston reserves its rights to submit to the Court at a later date evidence for a factual determination as to the amount of damages, attorney's fees, and prejudgment interest to which it is entitled. *See Trammell Crow Residential Co. v. Va. Sur. Co., Inc.*, 643 F. Supp. 2d 844, 859-60 (N.D. Tex. 2008) (noting that "there can be a determination of liability [under Chapter 542] without a calculation of damages," and approving the insured's reservation of its right to seek a factual determination of damages).

Dated: August 28, 2015

Respectfully submitted,

By: /s/ Jeff Golub

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**ATTORNEY IN CHARGE FOR
DEFENDANT GENE BY GENE,
LTD.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served in compliance with the Federal Rules of Civil Procedure on the following counsel of record by email and was filed electronically on August 28, 2015, in compliance with Local Rule 5.

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